

STATE OF MICHIGAN
COURT OF APPEALS

INDIANA COMMUNITY BANK,

Plaintiff/Counter-Defendant-
Appellee,

v

MARK A. WESTRATE, Individually and as
Successor Trustee, WILLIAM P. WESTRATE,
Successor Trustee, and BRUCE C. WESTRATE,
Successor Trustee, of the WILLIAM WESTRATE
REVOCABLE LIVING TRUST and of the JOAN
L. WESTRATE REVOCABLE LIVING TRUST,

Defendants/Counter-Plaintiffs-
Appellants.

UNPUBLISHED
February 18, 2014

No. 314134
Cass Circuit Court
LC No. 12-000169-CZ

Before: SAWYER, P.J., and BORRELLO and BECKERING, JJ.

PER CURIAM.

Defendants appeal by leave granted from an order of the circuit court granting partial summary disposition to plaintiff on their quiet title claim. We affirm.

The instant dispute has its origins in a foreclosure on a real estate mortgage. At issue in the foreclosure was a mortgage that covered approximately 200 acres of land in Cass County, divided into six parcels of varying size. The parties settled the foreclosure action, with defendants giving a deed in lieu of foreclosure and, among other things, defendants were given the right of first refusal to purchase two of the parcels involved in the foreclosure. The first parcel consisted of approximately 4.37 acres located in Volinia Township. The second parcel consisted of 11.766 acres located in Wayne Township.

The agreement covered both the possibility of a private sale of the land and a sale at public auction. The parcels were ultimately sold at public auction. The relevant terms of the rights of first refusal for the two parcels with respect to a public auction provided as follows:

Owner [plaintiff] intends to offer Premises for sale at a public auction. Owner will give Buyer [defendant trusts] 10-days notice before any such public-auction sale at which the Premises is offered for sale. Buyer will have the right to attend such public-auction sale and bid on the Premises under the terms, rules,

and regulations governing that public auction. If Premises is offered for sale at a public auction sale, this Right of First Refusal terminates when the bidding for the Premises has concluded. Buyer is responsible for attending the auction and placing the winning bid at the auction if it wishes to purchase the Premises. Owner satisfies its obligations under the Right of First Refusal by giving Buyer 10-days notice of the public-auction sale. Owner shall not bid at the auction.

It is undisputed that defendants were given the requisite ten days' notice and that plaintiff did not bid on the property at the auction. Rather, the dispute arises from how the auction was conducted.

All six parcels covering the 200 acres of land were offered for sale at the auction. Under the auction rules, bidders could bid on each of the six parcels individually. Bids were also accepted on all six parcels collectively. At the end of the auction, the sum of the high individual bids would be compared to the high collective bid. If the high collective bid was higher than the sum of the individual bids, the collective bid would be the winner. If the sum of the high individual bids was higher, then the six individual bids would be accepted as the winning bids.

Defendants, acting through William Westrate, did bid on the two parcels subject to the right of first refusal. Apparently he was the high bidder on the two individual parcels, bidding \$27,000 on one parcel and \$5,000 on the other parcel. But the high collective bid for all six parcels, in the amount of \$1,130,000, exceeded the sum of the individual high bids and was therefore deemed the winning bid. Defendants objected to the manner in which the auction was conducted, arguing that it violated their right of first refusal. These objections gave rise to the instant action.

The trial court initially denied plaintiff's motion for summary disposition on the quiet title claim, relying on MCL 600.3224. But on reconsideration, the trial court concluded that its reliance on that statute was misplaced and granted summary disposition to plaintiff on the quiet title claim.¹ The trial court later granted summary disposition on plaintiff's remaining claims.

Defendants argue that their rights of first refusal were violated when the parcels subject to the right were offered for sale along with the other four parcels. Defendants argued that the agreement required that each of the two parcels subject to the rights of first refusal be auctioned individually. We disagree. As plaintiff points out, the agreement states that defendants' right to bid on the property was subject to "the terms, rules, and regulations governing that public auction." Even more explicitly, the agreement stated that "Owner satisfies its obligations under the Right of First Refusal by giving Buyer 10-days notice of the public-auction sale. Owner shall not bid at the auction."

While we are not unsympathetic to defendants' argument that they effectively were unable to bring a winning bid on the parcels, ultimately we have to agree with plaintiff that it

¹ We agree that reliance on that statute was misplaced as it only deals with an actual foreclosure auction where multiple parcels are involved.

fully complied with the agreement regarding the right of first refusal. All that was promised was that defendants would be given ten days' notice of the auction, that plaintiff would not bid at the auction, and that defendants would have the opportunity to bid under the rules of the auction. There was no agreement over what those rules would be (or would not be).

Defendants argue first that the language of the agreement must be read as requiring the parcels to be auctioned separately. But no such language exists in the agreements. Because the language of the agreements clearly and unambiguously sets out plaintiff's obligations as outlined above, we must apply that language as written. *In re Egbert R Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008). Defendants next argue that such an interpretation renders the agreements illusory. We disagree.

An illusory contract "is defined as '[a]n agreement in which one party gives as consideration a promise that is so insubstantial as to impose no obligation. The insubstantial promise renders the agreement unenforceable.'" *Ile v Foremost Ins Co*, 293 Mich App 309, 315; 809 NW2d 617 (2011), quoting Black's Law Dictionary (9th ed), p 370, rev'd on other grounds 493 Mich 915; 828 NW2d 676 (2013).² While the agreements in the case at bar may not have imposed significant obligations on plaintiff, we cannot say that it imposed no obligations on plaintiff so as to render it illusory. First, focusing solely on the rights of first refusal with respect to an auction, it did obligate plaintiff to give notice of the auction to defendants, to refrain from bidding itself, and to not preclude defendants from bidding. Second, one paragraph of the agreement cannot be read out of context merely to declare those obligations "insubstantial." The agreements also gave a right of first refusal if plaintiff sold the parcels other than at auction. Accordingly, we conclude that the agreements granting a right of first refusal were not illusory.

Affirmed. Plaintiff may tax costs.

/s/ David H. Sawyer
/s/ Stephen L. Borrello
/s/ Jane M. Beckering

² Although our opinion in *Ile* is cited by defendants in their brief on appeal, the Supreme Court's order in *Ile* actually supports plaintiff's position. That order rejects the idea that "the perceived expectations of a party may override the clear language of a contract." *Id.* at 915.